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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 CERVECERIA MODELO de MEXICO,
4 S. de R.L. de C.V. and
5 TRADEMARKS GRUPO MODELO, S. de
6 R.L. de C.V.,

7 Plaintiffs,

8 v.

21 Civ. 1317 (LAK)

9 CB BRAND STRATEGIES, LLC,
10 CROWN IMPORTS LLC, and
11 COMPAÑIA CERVECERA de
12 COAHUILA, S. de R.L. de C.V.,

13 Defendants.

Oral Argument

14 New York, N.Y.
15 November 2, 2022
16 10:00 a.m.

17 Before:

18 HON. LEWIS A. KAPLAN,

19 District Judge

20 APPEARANCES

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(Case called; appearances noted)

THE COURT: Good morning to all.

The next calendar item for this morning has evaporated, so I can give you approximately 45 minutes, to a side, for both motions, not for each motion. What we'll do is I'll hear the defendants' motion first, and I'll hear both sides on that, and then we will go on to the plaintiffs' motion.

Ms. Goldstein.

MS. GOLDSTEIN: Thank you, your Honor.

Your Honor, ABI's entire case now turns on their view that the only products licensed to Constellation are products containing malt. This is ABI's position even though the federal government has a regulation that expressly authorizes brewers across the country to make beer using sugar as a substitute for malt.

THE COURT: Let me give you a little help here. I've heard this regulatory argument until it's coming out of my ears. Unless you can persuade me that I'm wrong in thinking that sophisticated parties, represented by some of the best lawyers in the country, decided to write their own definition and not to incorporate by reference the regulatory definition, if there is a regulatory definition, this argument has got no traction.

MS. GOLDSTEIN: Your Honor, we're on the *Hugo Boss*

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1 point, which I'm going to get to later. I'm not going to start
2 with that because I'm going to start -- I know we've talked
3 about *Hugo Boss* in the past, and so I'm going to start
4 elsewhere and actually play on plaintiffs' turf as much as
5 possible today, the dictionary definitions and all of that.
6 OK?

7 THE COURT: OK.

8 MS. GOLDSTEIN: But I do think it's important, your
9 Honor, to note that this case is all about malt. Now, how do
10 we know that it's all about malt? Because ABI said in its
11 opposition brief, "Constellation has always had an allowable
12 path under the sublicense, malt-based hard seltzers." So
13 they're now saying, they're now saying, your Honor, that
14 Constellation is licensed to make hard seltzers. That's not
15 the problem. And it's also undisputed, so we're allowed to
16 make hard seltzers, period.

17 It's also undisputed, and this very important, that
18 the production process for hard seltzers results in there being
19 absolutely no difference between hard seltzers that would be
20 attributed to the base material, so meaning, your Honor,
21 whether the brewer uses malt or sugar or some other
22 fermentable, it is undisputed -- they have agreed; it is
23 undisputed -- that there won't be any difference in the
24 finished product. And that's because, your Honor, after the
25 brewing and the fermentation, there's a filtration process that

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1 leads intentionally to a neutral base no matter what
2 fermentable is used. And that's at counterstatement of facts,
3 ABI's counterstatement of facts 207 to 210, your Honor. And
4 then flavoring is added. So we can make hard seltzer, and all
5 hard seltzers, whether malt-based or sugar-based, have a
6 neutral base, and then flavor is added. OK?

7 THE COURT: I'm going to ask you to hold up for a
8 minute.

9 Andy, is there anything we can do to sharpen the
10 sound? Because it's rather muddy, and I know that's not
11 Ms. Goldstein's voice.

12 OK. Let's try again.

13 MS. GOLDSTEIN: Should I start again, your Honor?

14 THE COURT: No, no.

15 MS. GOLDSTEIN: So, your Honor, this case is very
16 different than when we were here last year on our motion to
17 dismiss, because then, a key feature, your Honor will remember,
18 of ABI's argument was essentially we couldn't make Corona Hard
19 Seltzer, because the guy in the pub who ordered the beer
20 wouldn't consider hard seltzers to be a beer. And there was
21 all this consternation about, well, if you can make hard
22 seltzer, then can you make milk, right, etc., etc., or
23 Coca-Cola?

24 That's no longer the case, your Honor. They admit we
25 can make hard seltzer, and they admit that the hard seltzer

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1 that we can make would look, taste and pour the exact same way
2 as the Corona Hard Seltzer on the market today and, frankly,
3 any hard seltzer on the market today. And, frankly, your Honor
4 as they admit at counterstatement of facts 198 to 201, any
5 flavored malt beverage on the market today. All have neutral
6 base, all add the flavoring later. OK?

7 So the only, as I said, this is where I started, the
8 only issue we're left with is whether there's some malt
9 requirement in the sublicense, and I'd like to go through the
10 sublicense briefly, your Honor, to show you that there is
11 literally no malt requirement anywhere in the sublicense. The
12 parties, as we'll see, agreed to very specific rules around
13 other ingredients, like distilled spirits and yeast, but
14 nothing about malt. A lot about innovation, but nothing about
15 malt.

16 Your Honor, if we can, we're going to do this the
17 old-fashioned way, with paper, so I'd just like to hand up to
18 your Honor --

19 THE COURT: But if the proper definition of beer
20 requires malt, then your argument falls apart, right?

21 MS. GOLDSTEIN: And we will get -- if beer, beer
22 absolutely requires malt, both beer and malt beverage
23 absolutely requires malt, then I guess we have a problem,
24 except that not really, because you have to look at it in the
25 course of the contract. In other words, you look at beer, but

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1 you're looking in the course of the contract as well.

2 Your Honor, let me, if you don't mind -- of course
3 we're going to talk about beer. Why don't we start going
4 through the contract, because I think it will help. For
5 example, beer, as we'll see, beer requires, certainly by their
6 definitions, right, alcohol. What we'll see in the contract
7 that it says it includes a nonalcoholic version. Right? So
8 you start with beer, but then you have to look at it in the
9 context of the contract. And of course -- does that -- right?

10 THE COURT: I heard you.

11 MS. GOLDSTEIN: Right. If we can just hand up the
12 contract. Why don't we go through that, and then, of course,
13 your Honor, we'll hit beer. It's up there. I'm sorry, your
14 Honor. Your Honor already has the contract. OK.

15 And by the way, your Honor, even if lower-case b beer,
16 right, and we'll get to beer, because I know it's in your
17 Honor's mind, even if lower-case b beer, right, and malt
18 beverage require malt, capital-B beer doesn't because of the
19 versions language in the contract.

20 THE COURT: Because of the what language?

21 MS. GOLDSTEIN: The versions. The definition of beer
22 in the contract, your Honor --

23 THE COURT: Believe me, I could probably recite it.

24 MS. GOLDSTEIN: Right. So any other version. So it's
25 beer, ale, porter, stout, malt beverage and any other versions

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1 or combinations thereof.

2 THE COURT: I could have recited it.

3 MS. GOLDSTEIN: But your Honor, let's just quickly go
4 through the contract, because I think it's important for the
5 context.

6 THE COURT: And maybe if you'd talk a little slower.

7 MS. GOLDSTEIN: I will. Thank you, your Honor.

8 And as we go toward the contract, toward that end,
9 because I know your Honor's familiar with a bunch of things,
10 I'll take you to sub-provisions. If you want me to slow down
11 so you could read a little more, obviously, your Honor, please
12 let me know.

13 Starting, your Honor, at tab E, which is page 23, so
14 this is section 2.15A, which governs Constellation's right to
15 innovate new Corona and Modelo-branded products -- those are
16 brand extension beers. And you'll see there, your Honor, we
17 highlight at the end, it says, "Constellation beers shall have
18 the right to determine, in its sole discretion, the beer recipe
19 it uses for each new brand extension beer, which beer recipes
20 may be variations or derivatives of recipes of then existing
21 products or entirely new recipes, provided that such recipes
22 meet the quality standards."

23 So in light of that, your Honor, I just want to next
24 go to recipes and quality standards.

25 Recipes you'll find at tab C. Sorry, your Honor. I

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1 apologize, your Honor.

2 Recipes you'll find at tab D, and recipe means the
3 description and measure of ingredients, raw materials, yeast
4 cultures, formulas, brewing processes, equipment, and other
5 information that is reasonably necessary for a brewmaster to
6 produce a particular beer. No mention of malt. Talks about
7 yeast, a different ingredient. No mention of malt. And
8 obviously, your Honor, the ones I'm hitting on are the ones --

9 THE COURT: Unless beer comprehends malt.

10 MR. STEINBERG: Unless?

11 THE COURT: Unless beer comprehends malt.

12 MS. GOLDSTEIN: Right, but -- well, again, your Honor,
13 we have to look at the contract, because it's not just -- it
14 has to be beer, malt beverage or any versions of those. So you
15 could have a version of beer that doesn't have, just like you
16 could have -- I won't bury the lead.

17 THE COURT: I have a version of a red car that's
18 green.

19 MS. GOLDSTEIN: But, your Honor, one, you can have a
20 version -- I don't know if a version of a red car is green,
21 your Honor, but what I'm going to show you today is even
22 operating on their turf, we have what is undeniably a version
23 of beer, even in their dictionary. So, for example, their
24 dictionaries all talk about, it all starts with an alcoholic
25 beverage that, and goes from there.

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1 In the contract, it says you can have a nonalcoholic
2 version. So there is -- you have to -- but, as we're going to
3 see, and that's why I wanted to go to the contract, there are
4 limiting principles, and we identified those limiting
5 principles. One of them is yeast. One of them is you have to
6 have a brewing process. One of them is there has to be quality
7 standards. So in the sort of, if you think of the world as
8 kind of beer, wine, spirits and others, right, so you can't
9 have wine.

10 THE COURT: So if you're making chocolate egg creams,
11 that's perfectly fine, Corona chocolate egg creams, if you have
12 quality control and the manufacturing process.

13 MS. GOLDSTEIN: No, because an egg cream is not going
14 to have yeast. We can't put distilled spirits. In the world
15 of beer, wine, spirits, so let's talk about wine. Not doing
16 wine because you have to have a brewing process. Wine's not
17 brewed. Spirits, as you'll see in 2.15C at tab F there's a
18 very specific rule around distilled spirits. 2.15C, tab F, we
19 can't put in distilled spirits unless they do it first in
20 Mexico or Canada. So no dispute. If they do it, then we can
21 do it. But if they can't do it -- if they don't do it first in
22 Mexico or Canada, no distilled spirits.

23 So it's not going to be wine, because that would be a
24 brewing process. No distilled spirits. Beer, beer could be
25 broad, but beer, and it's not going to be, because you need

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1 yeast, it's not going to be chocolate milk or Coca-Cola.

2 Right?

3 So, does that make beer, any version of beer, could
4 that be broad? Sure, intentionally so. This is a contract in
5 perpetuity, your Honor. And what I hope to show your Honor
6 today is that there's no way around the fact that this is one
7 version of beer. That doesn't mean, your Honor, to be clear,
8 that we know, that we can sit here, nor do I expect your Honor
9 would ask the jury to figure out what every conceivable version
10 is or isn't. The question is, is Corona Hard Seltzer a version
11 of beer. And they admit that we can make a hard seltzer. They
12 admitted we can make a hard seltzer.

13 The question is only whether that hard seltzer has to
14 have malt, and I'd like to go through some points that make
15 clear it doesn't. But it's not as though -- you know, the fact
16 that we may not be able, today, here, to decide what are the
17 limits, I can't swear to your Honor we won't be back here
18 before your Honor. But when we have a product that clearly
19 fits within the contract, that's not a reason -- I don't think
20 your Honor's going to ask the jury to come up with what every
21 conceivable notion of what a version is. So we may be back
22 here someday on a product that we don't know the answer to.
23 But I hope to show your Honor today, this is a version, even
24 playing in their sandbox, this is a version of beer, capital-B
25 beer.

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1 So, your Honor, obviously quality standards, which are
2 all about, which is at tab C, those are all about
3 merchantability, being free from defects, compliance with
4 applicable regulatory standards. As I mentioned, there's a
5 provision on yeast, which, by the way, is a defined term.
6 There's no defined term malt, but there is a provision on yeast
7 at tab G that talks about the transferring of the yeast from
8 Modelo. What happens if the yeast colony of either party dies?
9 What happens if Constellation elects to stop using the yeast?
10 So a lot about how it works with yeast. Obviously nothing like
11 that with malt.

12 We've talked about the distilled spirits, which is at
13 tab F. And then, your Honor, there's only one other provision
14 that specifically mentions ingredients in the sublicense, and
15 then, of course, we'll get to beer. And that is section 3.3 at
16 tab H. And section 3.3 applies once a recipe is created, and
17 it allows Constellation to use functional substitutes for any
18 particular ingredient so long as the switch does not change the
19 finished product. So it's 3.3, titled importer products, and
20 by the way, importer products is defined to include brand
21 extension beers. That's at page 6 of the agreement.

22 Again, it reads, "To the extent a recipe or technical
23 specification specifies any particular ingredients, raw
24 materials, yeast cultures, formulas, brewing processes,
25 equipment, or other items, Constellation beers and its

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1 suppliers may use functional substitutes or replacements for
2 foregoing that do not change the finished product, as will be
3 determined by a reasonable qualified brewmaster." And I think,
4 your Honor, the substitution provision in section 3.3
5 highlights a big problem with ABI's case, because as I said,
6 ABI concedes that we can make a malt-based hard seltzer, and
7 separately, it's undisputed that the production process for
8 hard seltzer is designed so that there will be no difference in
9 hard seltzer flavors attributable to the base material.
10 Finished product is the same, whether the base material is
11 malt, sugar, sorghum, or any other fermentable.

12 And moreover -- again, the federal government, and
13 this has to matter, your Honor. The federal government has a
14 regulation titled materials for the production of beer which
15 expressly provide that sugar is a permitted substitute for
16 malt. So ABI is asking your Honor to enforce this, I have to
17 say meaningless, allegedly implicit malt requirement that would
18 only require Constellation to reformulate and re-release the
19 exact same product that's on the market today. And I'm really,
20 your Honor, not being flippant when I say meaningless. It's
21 literally meaningless since it's undisputed that whether or not
22 it's made with malt, Corona Hard Seltzer would look, taste and
23 pour the same.

24 And it's also meaningless because, according to ABI,
25 Constellation could have made a Corona Hard Seltzer with a malt

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1 base. And then again, your Honor, we have to look at this in
2 concert with the contract, because we can make -- they're
3 telling us we can make a Corona Hard Seltzer with a malt base,
4 and then section 3.3 allows us to, you know, then switch over
5 to a sugar base and then that sugar-based hard seltzer would be
6 a licensed product.

7 THE COURT: The rate of delivery is losing me.

8 MS. GOLDSTEIN: I'm sorry. Let me make this clear,
9 because this one's important.

10 Constellation -- the malt requirement is meaningless,
11 because, look at section 3.3, your Honor. What they are
12 saying, what they're saying to me, what they're saying to us is
13 that we can make a Corona Hard Seltzer with malt. Right?
14 That's a given now. We can make a Corona Hard Seltzer with
15 malt. Section 3.3 then says, well, if you have a functional
16 substitute that you can use for any of the ingredients in a
17 product that ends up making that product sort of, you know,
18 have the same finished product, then you can do that. That's
19 what the contract says at 3.3.

20 So you can make entirely new recipes. We know that.
21 But beyond, you can make entirely new recipes. That was the
22 other provision, and you can use functional substitutes, and
23 they've admitted that Corona Hard Seltzer with malt is going to
24 look, taste, feel the exact same as Corona Hard Seltzer with
25 sugar. They've admitted that.

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1 THE COURT: And where is this admission?

2 MS. GOLDSTEIN: At counterstatement of facts 207
3 through 210.

4 THE COURT: And which document are we talking about?
5 There are so many counterstatements of fact.

6 MS. GOLDSTEIN: Fair enough, your Honor.

7 OK. So it's document 218, and it begins on page 116
8 of that document.

9 THE COURT: Page 116?

10 MS. GOLDSTEIN: 116, yes, your Honor.

11 THE COURT: And where is the admission?

12 MS. GOLDSTEIN: So the admission, your Honor, starts
13 in paragraph 207, and it's undisputed that the brewing or
14 filtration for malt-based hard seltzers is to remove all
15 residual flavors, aromas and colors imparted by the malt with
16 the expectation of a base that is free of aroma, flavor, and
17 color. OK?

18 And then 208 is sugar-based hard seltzers are filtered
19 to remove similar, any flavor and color, developed, imparted
20 from the base sugar. It's similar, your Honor.

21 And then let's go to 210, which is undisputed that the
22 goal of filtration for hard seltzers is such that no difference
23 in hard seltzer flavors is attributable to the base material.

24 So no matter whether it's malt, whether it's sugar,
25 same -- it's going to look the same. It's going to taste the

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1 same. It's going to smell the same. You add your additives.

2 THE COURT: Except that they say right on the same
3 page multiple times that when you try to do it there is a
4 bitter aftertaste and it's not the same.

5 MS. GOLDSTEIN: All that's saying, your Honor, is
6 that -- you know, you have to allow for the possibility that
7 there are production glitches or something doesn't work, but
8 that's not at all -- but at bottom, so if you make a bad batch
9 of Coca-Cola or something doesn't work, you didn't do something
10 right, that's fine. But that is not at all saying -- you know,
11 at the end of the day, they could make a bad batch of Corona
12 Light that looks different, that tastes different than another
13 Corona Light. If we're in a world where we can make Corona
14 Hard Seltzer, it just has to have malt, but there's no
15 difference between the look, taste, pour, smell, that they
16 admit would happen.

17 THE COURT: OK. You've used half your time overall.
18 You can keep going, but I'm not going to let it go on. You
19 have 45 minutes on both motions.

20 MS. GOLDSTEIN: Understood, your Honor.

21 One point just on the contract, your Honor, which, we
22 did cite a number of cases, your Honor, all of which plaintiffs
23 ignore, that say where a license includes express limitations
24 on a subject matter -- so the license expressly talks about a
25 limitation. Right? We can see a number of limitations, yeast,

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1 distilled spirits, etc., but no limitations -- but omit other
2 limitations, in this case malt, then that is intentional. And
3 we cite the *Yves Saint Laurent* case and the *Canon* case, your
4 Honor. No response on that.

5 Your Honor, I mentioned earlier, and I mean it, I want
6 to play in their sandbox today. Right? So we believe the *Hugo*
7 *Boss* argument, but we can ignore that for today. I want to
8 focus, your Honor, on they say that the dictionary is the
9 answer. Right? We don't look to TTB rules, even though this
10 is clearly a TTB beer. We don't look to TTB rules; we look to
11 the dictionary to determine what is a beer and what is a malt
12 beverage. But your Honor, first of all, their dictionary
13 definitions talk about a beer usually being made from malt.
14 Well, the unusual ones would also fall into any other version.
15 They talk about beers that can be made from sugar. Well, your
16 Honor, and they say, oh, but those are secondary definitions.
17 When you deal with any other version, which is as broad as the
18 language gets, and we cited Second Circuit and Supreme Court
19 cases that talk about it's not just version, it's any other
20 version, any is as broad as it gets, says the Second Circuit,
21 and so says the Supreme Court.

22 And when we're saying, you know, so the fact that
23 something's a secondary definition, so what? It could be any
24 other version. But again, your Honor, I want to play on their
25 side, play in their box. So let's, for the argument's sake,

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1 you know all the dictionary definitions that are problems for
2 them and consider only the ones that are good for them. Even
3 assuming that, your Honor, no matter how ABI wants to define
4 lower case beer, there's no question that Corona Hard Seltzer
5 and Modelo Ranch Water have to be one possible version of beer.
6 We see that in a couple of different ways.

7 One, because it's undisputed that Corona Hard Seltzer
8 and Modelo Ranch Water are fully compliant and approved by the
9 TTB as beer, that has to be one version. We think, you know,
10 we use dictionaries. We think you use, that because of the
11 *Hugo Boss* Second Circuit law, we're not in dictionaries and
12 it's just TTB. But we're ignoring that for now. We're using
13 dictionaries. Still has to be the case that when the federal
14 government and New York, which is where the contract --
15 right -- the law governing the contract and 44 states regulate
16 beer, regulate this product as, in some way as beer, malt
17 beverage or malt liquor, all of which they admit, when -- how
18 could that not be one possible version of beer as they're
19 sitting there and negotiating the contract? We're not even
20 arguing now that, you know, the TTB has to control, but it has
21 to be one possible version of beer.

22 And your Honor, in response to that, what they say is
23 capital-B beer refers only to sort of subtypes. Like it has to
24 be like a lager, you know, a lager or a pilsner. Right? But
25 your Honor, those are beer. Right? A version -- we actually

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1 agree on something. A version has to be a particular form of
2 something differing in certain respects from the original. And
3 your Honor, part of the disconnect is ABI saying it has to
4 retain particular defining characteristics. But as I said,
5 your Honor, nonalcoholic, we have proof in the contract that
6 they're making that up, because nonalcoholic versions doesn't
7 retain -- if it's not alcoholic, it doesn't retain -- it
8 doesn't fit in pretty much any of their dictionary definitions.
9 And yet there's no debate nonalcoholic versions, especially in
10 the definition of beer, is allowed.

11 And then beyond that, your Honor, even if your Honor
12 doesn't look at this as a version of little-b beer, it has to
13 be also a version on or a variation on malt beverage. And we
14 know that, your Honor, because we have ABI admitting that a
15 malt-based license, malt-based hard seltzer is licensed as a
16 malt beverage, and that's enough alone, your Honor, to conclude
17 that a gluten-free version of that same product has to be
18 licensed under any other version. So what we have is a
19 gluten-free version of what they admit we can make. It's a
20 gluten-free version of what they admit we can make, which
21 again, they didn't at the motion-to-dismiss stage, but they do
22 now. They admit we can make a hard seltzer with malt. This is
23 a gluten-free version of that.

24 But again, your Honor, we have more than that. We
25 have them saying that actually there is no difference in the

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1 finished product. And so obviously, your Honor, and
2 particularly when considering section 3.3, it has to be at
3 least one other version.

4 If I might, your Honor, and then I will sit down, one
5 other way to look at this is during discovery, when we said to
6 them, you know, we were talking about what little-b beer is.
7 Right? And we said, well, of course little-b beer doesn't have
8 to have malt because there are plenty of malt-free beers on the
9 market, like, for example, Red Bridge, which is a beer that ABI
10 makes. Doesn't have any malt in it. OK? So a beer that ABI
11 makes that doesn't have any malt in it. There are lots of
12 them. It has sorghum in it, which, like sugar, is a substitute
13 for malt, thoroughly recognized substitute for malt. Right?

14 So there are beers out there on the market that don't
15 have malt in them. So we said, well, of course, it doesn't
16 have to have malt. Of course beer doesn't have to have malt.
17 Right? So their response is yeah, true, but those beers
18 emulate the qualities of a malted beer. And next thing you
19 know, all their witnesses, all the fact witnesses, all their
20 expert witnesses are talking about emulation, emulation of this
21 malt-free beer, your Honor. No reasonable juror, your Honor,
22 could find that the sublicense permits malt-free beverages.
23 And by the way, when they're talking about emulation, just to
24 be clear, they're saying it emulates because it tastes like it
25 or it smells like it or it pours like it or looks like it.

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1 Right?

2 And what I'm saying, your Honor, is that no reasonable
3 juror could find that the sublicense permits malt-free
4 beverages, like Red Bridge, right, that emulate what ABI says
5 is a beer -- so because it looks like that yellow beer and
6 tastes like that yellow beer, even though it doesn't have malt
7 in it, it's fine; it's licensed, it's fine -- but prohibits a
8 malt-free beverage that emulates what ABI says, meaning the
9 malt-free beverage being Corona Hard Seltzer that emulates what
10 ABI says is an allowable malt beverage, which is hard seltzer
11 with malt. Your Honor, I don't think any reasonable juror
12 could conclude that.

13 I will sit down and hopefully reserve some time.
14 Thank you.

15 THE COURT: OK. Thank you.

16 Mr. Steinberg.

17 MR. STEINBERG: Thank you, your Honor.

18 Let me hand up some slides for the Court. I'll put
19 them also on the monitor, and I'm going to move around a little
20 bit, because I think you've shortcut some of my argument today.

21 Thank you.

22 Your Honor, I want to start today with just the plain
23 and simple notion that plain meaning is really important for
24 clarity and predictability in contracts, and that what actually
25 Constellation is proposing as their theory of the case, they

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1 claim it's unambiguous in its interpretation, is actually a way
2 of creating chaos because it takes a regulatory definition and
3 it inserts it into a contract and destroys the clarity of that
4 contract.

5 Today, we're talking about very simple -- very
6 simple -- words that are clearly defined. They're common,
7 ordinary meanings. They're identified in dictionaries, and
8 they're really all quite clear. And Constellation's path, and
9 I'm not going to spend much time on their silent incorporation
10 of statutes, but that theory itself just is not only wrong, but
11 it's destructive. And in fact, they can't even get there, as
12 I'll explain in a minute. I think there's a Second Circuit
13 decision in the *Dish* case that I actually think is dispositive.

14 So let me go to slide two here. I'll focus more on
15 this in our portion, but I think the plain meaning of beer is
16 quite well-known. The plain meaning of malt is quite
17 well-known, and in both of these cases, it requires malt for
18 beer and flavored with hops. And for a malt beverage, of
19 course, it has to have malt. I don't agree, and I'll explain
20 why, that they get the rights to substitute, that they get the
21 right to change around and ignore malt, and that you can have a
22 malt-free version of a malt beverage. I just think that that's
23 a logically flawed position.

24 Now, let me just go to slide three for a second. I
25 mean they want to smuggle in, and you heard counsel for

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1 Constellation trying to smuggle in the definition, the
2 regulatory definitions, not only into the question of whether
3 or not it's beer but whether or not it's a version. And in
4 both instances, they can't do it as a matter of law.
5 Certainly, the *Hugo Boss* case doesn't help them. In fact, the
6 contract itself, the sublicense itself makes very clear that
7 you can't incorporate by reference these types of regulatory
8 definitions.

9 I'll make it very clear. There are three different
10 places in the sublicense where there are laws that are
11 discussed and that are specifically called out in the
12 sublicense by the type of law. So, for example, confusingly
13 similar is defined in the sublicense. Now, that's obviously a
14 trademark element, but they didn't rely on it just being
15 everybody knows it's a trademark. The drafters wrote that you
16 have to look to the likelihood of confusion law pursuant to
17 federal trademark law as interpreted, as applied in the federal
18 courts in the state of New York.

19 Same with the abandonment of the trademark. Could
20 have just written abandonment of trademark, but the authors
21 here, some of the marquee lawyers of the state, instead defined
22 it to be 15 U.S.C. 1127.

23 Same with intellectual property under the Bankruptcy
24 Code. Again, quoted and defined in Section 101. When the
25 authors of this agreement, when the parties to this agreement

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1 wanted to reference a federal law, they knew precisely how to
2 do so. And that's why -- let me go to the next slide. That's
3 why this case is actually, I think, decided it by a 2021 Second
4 Circuit case, *Dish v. Ace*. And in that case, you had *Dish*, who
5 is the telecommunications company, claiming that they had been
6 sued for a function called the hopper, where you press the
7 button on your Dish and it skips over commercials, and there
8 were contract and trademark claims that Dish lost. And so Dish
9 went after its insurer, and the point of this case that I want
10 to draw the Court's attention to is in that case the Second
11 Circuit said, "where the parties to this policy intended to
12 incorporate a legal or statutory definition of a term, the
13 policy says so explicitly."

14 That's what I just showed you in the sublicense, very
15 explicit references. And in that case, if the parties had
16 intended the word "broadcasting," which was the undefined term,
17 to take on a definition assigned by the FCC or the FCA, the
18 regulatory agencies, they could have easily pointed to those
19 sources. And as a result of that, the Second Circuit said we
20 reject Dish's invitation to discard the plain and ordinary
21 meaning of the term. The parties here were as clear as could
22 be about what was going to be incorporated and what was not
23 going to be incorporated, and there is no evidence in the
24 record that there's any ambiguity about beer or malt beverage
25 that would allow these types of interpretations. It's the

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1 plain and ordinary meaning that controls.

2 So let me go, and I would say the same thing, that the
3 district court focused on the same very element, which we had
4 on the bottom, which was that "where the 2011 policy intends to
5 adopt a statutory definition of a term, it does so explicitly."
6 That's just not the case here. And frankly, I think that's
7 actually the independent of their case. I think *Dish* is the
8 beginning and end of Constellation's case.

9 Let me go and talk for a moment about -- actually, let
10 me talk about slide one of the rebuttal. And this is in our
11 rebuttal deck, so I apologize. It's going to take a moment to
12 pull it up. But the license grant here, what allows them to
13 use the trademark is honed in on one thing and one thing only,
14 and that's beer -- beer with a capital B, as defined. And all
15 of these, the trademark grant in 2.1 says that the grant of the
16 license is "solely in connection with importing, advertising,
17 promoting, marketing, and selling importer products and interim
18 products."

19 Importer products is beer produced in Mexico by
20 Constellation on behalf of Constellation beers. So it's beers
21 produced under this agreement, pursuant -- or by a supplier
22 pursuant to a supply agreement. Product, which is again part
23 of that, "means beer packaged in containers bearing one or more
24 of the trademarks." Brand extension beer, again, is beer. All
25 of these -- and container, this is actually my favorite.

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1 "'Container' means the bottle, can, keg or similar receptacle
2 in which the beer is directly placed."

3 Beer is a liquid. It gets directly placed into the
4 containers. That's what we're talking about, the plain and
5 ordinary meaning.

6 And instead, what you get from Constellation is a
7 bunch of claims that are, frankly, wildly exaggerated. So, for
8 example, let me talk about this notion that because they
9 couldn't make a malt beverage, they get the right to make a
10 sugar beverage, sugar-based beverage and claim, well, it's
11 exactly the same. That is just absolutely false. We gave them
12 the right to make a malt beverage, and if they could make a
13 malt beverage, we wouldn't be bothering your Honor. It's as
14 simple as that.

15 The problem was, and as your Honor acknowledged and is
16 aware in the record, the record shows they couldn't do it, and
17 they didn't want to do it for another reason too. They
18 couldn't make it taste right. OK. But they also wanted to
19 claim gluten free. They wanted that gluten free, and that
20 takes it out. They're not the same. They are not the same in
21 the marketplace, they're not the same in production, and they
22 couldn't make it taste the same. If they could -- we say it
23 today, we've said it in the past -- if you want to make a malt
24 beverage, go for it. We allowed Refresca, a malt beverage, to
25 go through. That's not an issue, but they couldn't make it

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1 work. They just couldn't make it work.

2 And so instead, they point your Honor to provisions of
3 the agreement that relate to functional substitutes. And the
4 functional substitutes is really completely irrelevant. It's a
5 red herring, your Honor, because for one thing, they've already
6 conceded in ECF-172 at 25 and ECF-214 at 23 that section 3.3,
7 this functional substitute language, only applies to a
8 preexisting recipe. Only applies there. And by the way,
9 again, it still, even with a functional substitute, has to be a
10 beer. There's no exclusion in the beer definition for
11 functional substitutes. The license grant is for beer, not
12 beer as modified by functional substitutes.

13 And so, for example, let's say there were a blight on
14 certain types of hops and they needed -- they come to Modelo
15 and they say, hey, we'd like to use not the very same ones that
16 you've sourced out of Mexico for generations; we'd like to use
17 a slightly different one from a different farm with slightly
18 different characteristics. We think the taste isn't going to
19 matter. And then we would evaluate that with a qualified
20 brewmaster -- by the way, a qualified brewmaster, not a
21 qualified seltzer judge. But a qualified brewmaster would
22 determine whether or not this was a functional substitute. And
23 of course, this is a trademark license, which requires Modelo
24 to have quality control. And of course, we want quality
25 control. The whole point, and the success of Modelo is built

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1 upon the consistency of its presentation, the consistency of
2 its products, and the consistency of the taste. Of course we
3 have an obligation to evaluate it and to make sure that they
4 meet the quality standards.

5 But the fact that they have a recipe right doesn't
6 mean that it changes it. And they have a lot of rights to
7 innovation. To be sure, they have rights to innovation, but
8 innovation within capital-B beer, not outside of it. The
9 innovation isn't a trump card that they can use to play it out.

10 Again, I point to recipe. Recipe is what you need to
11 make it reasonably necessary for a brewmaster to produce a
12 particular beer. Whatever sole discretion they get, it's
13 constrained flatly by beer.

14 So I think that there's just really no ability for
15 Constellation to sort of suggest that plain and ordinary
16 meaning goes away here. The plain and ordinary meaning does
17 not go away. The plain and ordinary meaning is supplied by the
18 dictionaries. And malt, for a malt beverage, is what creates
19 the source of alcohol. That's for sure.

20 Now, there's been a lot of other suggestions here, and
21 let me go, I want to switch gears for a moment and switch to
22 versions. So let me go, I think slide 15 is where I want to
23 go.

24 So, actually, where I'm going to go, I think our
25 version argument, I think we all agree, everybody in the room

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1 agrees, what is the dictionary definition for version, your
2 Honor, and it's a particular form of something. So there is a
3 class of a something, and version is a particular form of that
4 thing. And it differs in certain respects, to be sure, but it
5 differs in a way that doesn't change it. It has to be an
6 earlier form or other form of the same type of thing. So
7 again, we sort of look at it. Let's go to the next. If you
8 actually substitute the word "beer" for the something, it makes
9 it all very clear: A version of beer is a particular form of
10 beer differing in certain respects from an earlier form or
11 other forms of beer.

12 THE COURT: It depends on the level of generality in
13 which you've defined, right?

14 MR. STEINBERG: For sure it doesn't. I'm glad your
15 Honor raised that, because what they actually say, and I agree
16 with this -- I don't agree with their position, but what they
17 say is, and they said it at the motion to dismiss, is that
18 theirs is a form of an alcoholic beverage. To be sure, that's
19 correct. And it is, for sure, it is a version of an alcoholic
20 beverage. That doesn't make it a version of a beer. And it
21 doesn't make it a version of a malt beverage, because, by the
22 way, for both beer and malt beverage, malt is the defining
23 feature. You can't take the defining feature from the
24 definition. I mean definition, defining feature, it's all the
25 same. You can't regulate nugatory by saying it's a version and

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1 throwing it out.

2 Now, to be sure, there is a leveling issue. Right?
3 And we talked about at the motion to dismiss whether or not a
4 car is a version of a tricycle. You know, there are levels of
5 transportation, to be sure, but they're certainly not one.
6 Actually, I was happy you mentioned a red car, your Honor,
7 because let's take a look at an ordinary use of the word
8 "version." So Porsche 911 Carrera coupe version, well, that's
9 a particular form of something that when you compare it against
10 the 911 convertible, it differs in certain respects from an
11 earlier form or other form of the same type of thing.

12 Now, next, a Ford Mustang -- great car, by the way,
13 love the car, but it's not a version of a 911. OK? It's just
14 not a version of a 911. Now, we could level up and talk about
15 sports cars, and they would be, for sure, different versions of
16 sports cars, but that's not the level at which the beer
17 definition operates. And so instead --

18 Let's go two more.

19 THE COURT: Yes, but back up for a minute.

20 MR. STEINBERG: OK.

21 THE COURT: You can make arguments about your 911
22 comparison. I mean one's got a roof, one doesn't have a roof.
23 If we're talking about the something being a convertible, then
24 the 911 coupe and the 911 convertible versions are not
25 different versions of the same thing.

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1 MR. STEINBERG: In a sense -- right, we're asking, but
2 we already have this implied comparison. We have beer. We
3 already have this implied comparison, so now we're asking are
4 there other versions of beer, versions of the foregoing? Is it
5 a version of beer? Is it a version of an ale? A stout,
6 porter? Is it a version of a malt beverage? We already have
7 the comparator. Right? We have that and it's stable. And the
8 defining feature of beer is flavored with hops, made with malt.
9 The defining feature of malt is made with malt. It's not a
10 version if you have to blow those two up. It doesn't remain a
11 version.

12 And what's interesting, too, about their argument,
13 actually, they try to sneak the regulatory definitions back
14 into it, and they say in their brief, and this is actually what
15 I call *Hugo Boss* part 2, because what they really do is they
16 say -- and you heard Constellation's counsel try to do it
17 today -- well, for sure, it's a regulatory version of a beer
18 because the TTB governs it, and therefore, it must be and, you
19 know, you have this malt definition. Of course, under the IRC,
20 malt is not required. So it's a version, version, version.
21 And they say but there's actually a limit, and the limit is
22 because, well, again, it's based upon regulation. So they said
23 the CBI products are at the very least one possible form of
24 beer. Why? Because of regulations.

25 So they're smuggling *Hugo Boss* right back in. They're

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1 doing violence to the word "version." Violence. And then they
2 say, oh, but no worries because there's a limit to what we want
3 to do because Chardonnay, cola and water are not regulated as
4 beer and malt beverages. But they are using the regulatory
5 regime to define the common and ordinary uses of the word.
6 They've smuggled it back in, and I think that's improper.

7 I want to mention one other thing, which I think is
8 just vastly wrong, but they make a lot about nonalcoholic. We
9 heard a lot about nonalcoholic in the presentation, but your
10 Honor, in our brief, filed at document 232 -- for sure, there
11 are too many briefs, but this is Modelo's reply in support of
12 its motion for partial summary judgment, and in footnote six of
13 that, we cited a nonalcoholic definition of a version, what
14 does nonalcoholic mean? And nonalcoholic means that it still
15 has to -- here, let me -- of or relating to or being a beverage
16 whose alcohol content is very low or negligible.

17 The fact is that to make beer, you're going to
18 ferment. You're going to create alcohol, and what the
19 nonalcoholic, the common and ordinary use of that word, as
20 defined in the dictionary, is you then remove or limit the
21 production of alcohol. That doesn't mean it's at a zero. That
22 means nonalcoholic, and that's the dictionary definition, the
23 plain and ordinary meaning. The very production of it is going
24 to create alcohol. You can limit it, but when it says
25 nonalcoholic versions of the foregoing, that, again, is a

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1 dictionary defined term, meaning of or relating to a very low
2 amount of alcohol.

3 So I think, when I think about Constellation's case,
4 Constellation, the only way the case gets traction is by
5 incorporating things that the parties said they weren't going
6 to incorporate. It's just as simple as that. They claim that
7 their contract, their interpretation is an unambiguous
8 interpretation. We say that's not true. We say that that
9 route, that route which is legally flawed, we say instead that
10 there is a plain and ordinary path, a plain and ordinary
11 meaning path. It's the path that reflects the intent of the
12 parties. It's the path that the Second Circuit said was the
13 appropriate path in the *Dish* case, and it's true to the words
14 of version. It's true to the meaning of version.

15 You cannot have a malt-free version of a malt
16 beverage. It does violence to that word. It does violence to
17 the malt beverage. And the fact is, again, we would not be
18 here if they made it from malt. The record shows, and what we
19 learned in discovery, is they tried. The first iteration out
20 of the box for them was to create a malt beverage, and it got
21 rejected. It got rejected for taste and, for sure, it got
22 rejected for marketing, because they wanted to make a
23 gluten-free claim. Both. But that's not allowed. That's not
24 what the contract permits, and there's no basis to ignore the
25 malt requirement for purposes of this beverage.

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1 I'll be happy to sit down and reserve the rest of my
2 time.

3 THE COURT: OK.

4 Ms. Goldstein, if you want a brief rebuttal, you can
5 have it, but I'm running the clock.

6 MS. GOLDSTEIN: So, your Honor, I want to go back to
7 section 3.3, which is, again, the substitutes. What we're
8 literally saying, your Honor, is we can make -- and by the way,
9 3.3 does relate to the brand extension beers. Those are the
10 new beers that you're allowed to make. Right? The new, what's
11 newly allowed to innovate. They keep on trying to say it
12 doesn't, but it does, because the title there importer
13 products. Importer products is defined to include brand
14 extension beers. So it absolutely does apply to us. And what
15 they're basically saying is we can literally make one can of
16 what they admit we can make, Corona Hard Seltzer, with malt in
17 it, and then we'd be able to substitute for sugar. Right?

18 That's commercially unreasonable. But commercially
19 unreasonable, your Honor, so you understand, and I think we had
20 this in the papers, they're waiting in the wings to make Corona
21 Hard Seltzer with sugar. They have an intent to use. So what
22 they're saying is we can have, on the same shelf, right, a
23 Corona Hard Seltzer with malt that is an allowable path for us;
24 we're allowed to make Corona Hard Seltzer with malt, and
25 they're waiting to make a Corona Hard Seltzer with sugar. The

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1 application's out there. I heard him talk about commercially
2 reasonable, my friend here. That's commercially unreasonable.
3 We're going to have Corona Hard Seltzer with malt. And
4 confusingly similar, I believe he used those words too. We're
5 going to have Corona Hard Seltzer with malt, and their Corona
6 Hard Seltzer with sugar is going to be right next to it.

7 Your Honor, it cannot be that we can make a Corona
8 Hard Seltzer with malt and can't make a Corona Hard Seltzer
9 with sugar when they've admitted that they are functionally the
10 same. And your Honor, Mr. Steinberg said malt is the defining
11 feature for beer. But Red Bridge and other beers that are out
12 there on the market now don't have malt. So it can't be a
13 defining feature, as they're defining it, for beer. Those
14 don't have malt. That was the whole emulation. When we made
15 that point, all of their witnesses started talking about, yeah,
16 yeah, yeah, but it emulates beer. It emulates beer.

17 OK. Well, what we're doing emulates their definition
18 of a malt beverage. By the way, there is a different real
19 definition of a malt beverage, but again, we're playing on
20 their turf today. Their definition of a malt beverage, our
21 beer absolutely emulates -- Corona Hard Seltzer emulates that
22 version of a malt beverage, looks, tastes, smells the same,
23 just like Red Bridge and the other malt-free beers on the
24 market emulate what they call Corona Extra.

25 And your Honor, we know that versions includes things

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1 without, as Mr. Steinberg will call it, the key ingredient,
2 because, again, the contract makes clear any other version is
3 including nonalcoholic. There's no debate. Right? I'm sure
4 if we made an alcohol free, they'd come in and say, oh, you
5 can't do that either. But the contract clearly says it can be
6 nonalcoholic. They have no answer to that.

7 And your Honor, they didn't answer our Tesla analogy
8 either when we were talking about cars. We said the dictionary
9 defines an automobile to have four wheels, operating on
10 ordinary roads, and gasoline or diesel combustion engine.
11 Well, Tesla's a version of an automobile without the combustion
12 engine. So your Honor, no answer to that. And it has to be
13 the case, your Honor.

14 THE COURT: Wasn't a Stanley Steamer an automobile?

15 MS. GOLDSTEIN: Honestly, your Honor, I don't know.

16 THE COURT: I think it was.

17 MS. GOLDSTEIN: But again, your Honor, we know there
18 has to be some, it has to allow for some of what they're
19 calling defining characteristics. By the way, this defining
20 characteristic that they're focused on mentioned nowhere --
21 nowhere -- in the contract, nowhere, despite the fact that many
22 other things are mentioned. And your Honor, I have to say if
23 you're an executive negotiating this contract and you had
24 really intended that there has to be malt, there can't be a
25 malt substitute, that you as a beer executive know you can use

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1 every day, right, the 27 C.F.R. 2515 materials for production
2 of beer, malt is a substitute -- sugar is a substitute for
3 malt. So you're a beer executive. You're allowed to use a
4 substitute, use various substitutes, you use them all the time.
5 But you're intending as you're sitting in that negotiation that
6 there must be this malt requirement. Would you have really
7 drafted a contract, your Honor, that has all the provisions
8 about entirely new recipes. We can make entirely new recipes.
9 We can have those substitutions in 3.3 as long as it doesn't
10 change.

11 THE COURT: I think we're just re-covering what you
12 said before. I think you should wrap it up.

13 MS. GOLDSTEIN: I would like, your Honor, because I
14 think there's been violence done, I think was his word, but
15 there's been violence done to *Hugo Boss*. We are not smuggling
16 *Hugo Boss* into, his words, into the that's why this has to be
17 one possible version. If *Hugo Boss* controls, and your Honor,
18 we do believe *Hugo Boss* controls, then we're in a world where
19 because the -- and I did give your Honor a side by side; I just
20 want to look at it very briefly. Because the beer
21 definition -- beer, ale, porter, stout, right -- comes
22 directly, obviously, and they admit. You remember the red line
23 that they did. They admit that beer, ale, porter, stout starts
24 from the TTB definition. They admit that. So beer reads beer,
25 ale, porter, stout, and then goes on. They admit that that

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1 comes from the TTB definition of beer. And because of that,
2 because it's rooted in this TTB definition of beer, then we say
3 the TTB definition of beer controls. If that's the case, of
4 course we wouldn't because sugar is a substitute for malt under
5 TTB, but that's not the argument we're making.

6 THE COURT: It doesn't, and that ship sailed months
7 ago.

8 MS. GOLDSTEIN: But, your Honor, what I'm saying is,
9 my point is we are playing on their turf today. So if TTB --
10 if *Hugo Boss* controls, there would be nothing to talk about.
11 We wouldn't be talking about dictionaries.

12 I'm saying even looking at the dictionary definitions,
13 right, focusing on dictionary definitions, where our contract
14 says including any other versions, it's fair to say that a TTB
15 version is a version. It may not be -- you know, if your Honor
16 doesn't think *Hugo Boss* controls, then that just means the
17 construct we're dealing with can include dictionaries and plain
18 meanings. But that's not the same. It's not the same
19 argument. I just want to make that clear, your Honor. It is
20 not the same argument.

21 THE COURT: OK. Let's wrap it up.

22 MS. GOLDSTEIN: All right.

23 And your Honor, I don't -- I think with respect to --
24 I don't know whether your Honor wants to hear about all the
25 record evidence that exists.

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1 THE COURT: Nothing else now.

2 MS. GOLDSTEIN: OK.

3 THE COURT: OK. The defendants' motion for summary
4 judgment is going to be denied.

5 Let's hear from the plaintiffs on their motion for
6 partial summary judgment.

7 MR. STEINBERG: Your Honor, with regard to the
8 plaintiffs' motion, I think it's a very simple case, and New
9 York law requires the common and ordinary use of dictionary
10 definitions. The Second Circuit makes clear that dictionaries
11 supply the reference. It allows the parties not to be
12 surprised, and it allows the parties to understand the
13 contracts that they enter into.

14 There is no dispute in the record about what is a
15 dictionary definition of beer. Beer must be flavored with hops
16 and it must have malt.

17 THE COURT: What about the word "usually"?

18 MR. STEINBERG: So I think "usually" actually adopts
19 the New York legal standard, because that's what it is. What's
20 the opposite of usual but unusual? "Usually" means that it's
21 the usual, common, ordinary, everyday meaning. I actually
22 think that that just dovetails perfectly into what is the New
23 York legal standard, because we're not talking about uncommon
24 uses here. In unusual situations it means this. If there were
25 an unusual situation, I think that would be one thing. But

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1 that makes it actually, I think, not a usual and ordinary --

2 THE COURT: But the language implies, arguably, that
3 in unusual situations, something without malt or without hops
4 is still within the definition of beer.

5 MR. STEINBERG: Well, I would actually think that --

6 THE COURT: Unusual, but it can be.

7 MR. STEINBERG: But that's the point, is I think to me
8 it's the unusual question. I'll make sure I'm speaking into
9 the mike.

10 It's the unusual point that makes it so actually
11 important, because the common and ordinary meaning of the words
12 and what we're to identify -- again, you have to go by
13 reference to a dictionary. And again, if New York law is what
14 is the common, usual, ordinary course, then it's just the two
15 dovetail, and that's our position on it.

16 THE COURT: I don't think the word "usually" is in the
17 New York standard.

18 MR. STEINBERG: Well, it's common, and I've seen --
19 and I'll find it. Also, I think it is usually, but that case
20 is not coming to mind. And let me just sort of play it around
21 with you.

22 So there are, and I've seen those dictionary
23 definitions, your Honor. We have ten different dictionary
24 definitions or nine that we have.

25 THE COURT: You've got them outnumbered on

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1 dictionaries.

2 MR. STEINBERG: Well, it's the quality, not the
3 quantity.

4 THE COURT: That's what they say.

5 MR. STEINBERG: And we would agree, but we think that
6 this certainly defines the parameter. But the point would
7 be -- so, let's assume that there's a usually made with cereal,
8 malted cereal usually made with malt. That doesn't save them
9 at all here, because to be for it to be a small-b beer, it has
10 to be flavored with hops. Flavored with hops, and they have no
11 evidence of that.

12 In fact, their 30(b)(6) witness said that
13 Constellation agrees that the hops acid extracts it uses does
14 not have aroma-flavor functionality. They admit that the only
15 quote/unquote hops that they add, the hops extract is made as a
16 preservative, not for flavoring. So let's assume that you can
17 say that it usually means that malt is not always required.
18 Let's just go there. It doesn't help them, because under beer,
19 they still have to have flavored with hops, and they don't have
20 it. Simply put, they don't have it.

21 And so that's fine for small-b beer, and of course,
22 for malt beverage, it has to have malt. So I think just under
23 a very plain meaning, Constellation loses. I don't think it's
24 very tough to get to the answer of why is that true? And if
25 it's not a beer or it's not a malt beverage, it has to be a

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1 version of the foregoing, and it's not a version of the
2 foregoing. And again, we get back to the question of what is a
3 version, and the parties do not disagree on the dictionary
4 definition of that. It's all quite clear. So this is and
5 always has been a very simple case. And I want to address one
6 item, this gluten free, because I think it's sort of a big red
7 herring.

8 First, you know, they mentioned Red Bridge. This is
9 sort of in the unusual camp. Red Bridge is .015 percent of
10 ABI's U.S. volume. .015 percent. We are talking rarest of the
11 rare. And while there's nothing in the record suggesting the
12 existence of a malt, of an unmalted sorghum, but let's just
13 pass that for a moment, because let's assume that there's some
14 product made without malted grain, but it's not a beer under
15 the plain and ordinary meaning of the word, because it doesn't
16 have malt. And under New York law, the plain and ordinary
17 meaning is dispositive to interpret a contract, and we look to
18 the dictionary. And again, it's got to be made from a malted
19 grain. So this hypothetical goes nowhere.

20 But there is a way to get around the plain and
21 ordinary meaning of a word, and that is to claim that it is
22 trade usage. On this motion, they've been very clear that
23 they've disclaimed all trade usage. Now, we can have that
24 debate about whether or not they meet the standard for trade
25 usage. We cite that standard as the *Law Debenture* standard,

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1 which requires that the usage be general, uniform, and
2 unvarying. But they have no evidence that they're going to
3 meet that standard. They disclaimed it in opposition to this
4 motion. They've said that trade usage on both sides is
5 irrelevant to these motions.

6 So, your Honor, I think this is really quite a simple
7 case, and they've made it very simple. We've said it's simple
8 all along. We do not agree that they can smuggle in the
9 portions of the regulatory world that they like and disregard
10 other regulations that they don't like. This is a simple case.
11 The dictionary defines the case, defines malt beverage, defines
12 beer, and that's the beginning and end of it.

13 Thank you, your Honor.

14 THE COURT: Thank you.

15 Ms. Goldstein.

16 MS. GOLDSTEIN: Your Honor, I don't see anywhere in
17 the contract where it says that what percentage of business the
18 product is going to be helps define whether the product is in
19 or out, your Honor. So the fact that Red Bridge is a small
20 percentage, so what? It goes back to maybe these are unusual,
21 but as your Honor said, I think, you know, any other versions,
22 of course, includes unusual, unusual beers as well. And your
23 Honor, of course there is, in light of your Honor's ruling, at
24 least a fact issue as to what is a beer and what is any other
25 version. And the record is replete at this point with clarity,

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1 frankly, for our position on this, your Honor, but that's not
2 for summary judgment, your Honor.

3 But there is, between trade usage in terms of beer,
4 wine, spirits category and the course of dealing between the
5 parties and the negotiation history and everything that they
6 have said about what beer is, what they told the DOJ that beer
7 is, what they said in their press release, press releases beer
8 is, how we outright own the Modelo business now, etc., etc.,
9 your Honor, and again, literally telling the DOJ that beer is
10 defined, the beer that we have been making is, the Corona Hard
11 Seltzer is defined by the federal TTB definition and includes
12 specifically citing the malt beverage alternatives, etc. And
13 between all the negotiations, they make clear that Corona Hard
14 Seltzer would be a product that would be included, your Honor.

15 There's just no question that the record is replete at
16 this point with fact issues, in light of your Honor's ruling,
17 on what is beer and what is versions and what is any other
18 version, your Honor. So for all the reasons we cite in our
19 motion that we think were right, we think those oppose their
20 motion as well, and there are a lot, your Honor, of, you know,
21 of documents and testimony that make clear that we're right
22 here.

23 And I do, your Honor, just want to say, I really
24 didn't talk much about "any" and "other." You know, "any" is
25 indiscriminately of whatever kind, any other versions. "Any"

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1 is indiscriminately of whatever kind. Right? As I mentioned,
2 Supreme Court, Second Circuit have made very clear, it is very,
3 very expansive. And "other" is distinct from those first
4 mentioned. And your Honor, it's clear to us that in the beer,
5 ale, porter, stout malt beverage, that's saying that there are
6 five items in the definition of beer -- beer, ale, porter,
7 stout, malt beverages. And then there's a sixth group, and
8 that sixth group of products is any other versions or
9 combinations of the preceding list of products, your Honor.

10 I think, your Honor, there's no debate that there is,
11 in light of your Honor's ruling, at least a fact question as to
12 what the intent of the parties here was in beer, and
13 unquestionably, your Honor, the summary judgment should not be
14 granted for plaintiffs here, your Honor.

15 Thank you.

16 THE COURT: Thank you.

17 Anything else, Mr. Steinberg, in closing?

18 MR. STEINBERG: Just one thing, your Honor.

19 I did find the case that I wanted to cite to your
20 Honor about "usual," and this comes from a case, *Ability*
21 *Insurance Company v. St. Paper LLC*, Judge Daniels, March 29,
22 2022, 2022 WL 912927 at *5. And in that case, Judge Daniels
23 describes the New York standard as plain, ordinary, and usual
24 meaning.

25 And so, look, I think at the end of the day, we all,

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1 everybody agrees that this is sort of -- I hate to come back to
2 it, but it's the man in the pub issue. If I order a beer, I'm
3 not going to be pleased when it comes back as a hard seltzer,
4 and it's just simply the ordinary and common usage of the word.
5 Some words are so simple and so basic, like beer, that we know
6 what they mean. They haven't identified a factual issue that
7 requires a trial. Of course, if you want a trial, we'll have a
8 trial, but they haven't identified a basis for one at this
9 moment.

10 With that, your Honor, thank you very much.

11 THE COURT: Thank you.

12 If, for the sake of argument, both motions were
13 denied, how long a trial do you anticipate?

14 MR. STEINBERG: Your Honor, do you want me to go to
15 the lectern?

16 THE COURT: You can stay where you are as long as I
17 can hear you.

18 MR. STEINBERG: Thank you, your Honor.

19 I think that before a trial, there needs -- I was
20 hoping that we would have a two-week trial, but I think there's
21 a lot of evidence that needs to be stripped away. I think this
22 case is in bad need of some motions *in limine*, because there
23 are a number of different issues that need to be stripped away
24 to have us ready for trial. And it's unfortunate, but -- I'm
25 not blaming either side; I just think that in a case like this,

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1 people come up with a lot of creativity. But I think that
2 creativity has to be stripped away. And so my suggestion, of
3 course, not meaning to impose on your Honor, is that we have a
4 series of motions *in limine*, because I think that will change
5 the scope of this case immensely.

6 I think, for example, if motion *in limine* No. 1 were
7 the elimination of regulatory meanings, the *Hugo Boss*, that
8 would by itself cut down quite a lot. Now, your Honor hasn't
9 decided that. Your Honor just denied their motion, but I think
10 if we were to address those, they have a series of other claims
11 that we'd like to address. They're going to have, of course,
12 *Daubert* motions on our experts; we're going to have *Daubert*
13 motions on theirs. But I do think this case cries out for some
14 motions *in limine*, and it will, but with the goal of getting it
15 to a two-week trial.

16 Thank you.

17 THE COURT: Ms. Goldstein.

18 MS. GOLDSTEIN: Your Honor, I actually agree. I
19 probably would reverse some of what was said, but we agree. We
20 think there's motion practice that would be quite useful and
21 also envision a two-week trial.

22 THE COURT: And you people -- not that I'm trying to
23 dissuade you; don't misunderstand -- have a jury demand and you
24 think you're going to try this to a jury?

25 MR. STEINBERG: Yes, your Honor.

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1 Your Honor, with that stated, I would go back to my
2 client. Maybe I'd have a different perspective on it.

3 THE COURT: Well, I'm not urging you.

4 MR. STEINBERG: I know you're not urging me.

5 THE COURT: Because this --

6 MR. STEINBERG: I urge clarity, so I want to have that
7 discussion with my client before we make that finding.

8 THE COURT: I've given a lot of thought to how a jury
9 would approach this case, and -- well, OK. I won't say any
10 more about that.

11 There's another subject I want to discuss with
12 counsel. I don't really know, but I assume one side at least
13 is a public company. Right?

14 MR. STEINBERG: Both.

15 THE COURT: Both.

16 MR. STEINBERG: Both companies are public. Modelo is
17 a subsidiary of AB InBev, which is a public company. And
18 Constellation itself is a public company.

19 THE COURT: OK. So I think to avoid anything coming
20 on to the public record that possibly should not come on in
21 this context, I would like to see Ms. Goldstein and
22 Mr. Steinberg in the robing room with the reporter, and then we
23 can decide whether we just release the transcript or whether
24 there's some reason not to. OK?

25 (Pages 48-51 SEALED)